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March 30, 2021

Via ECF

The Honorable Stewart D. Aaron
United States Magistrate Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Plaintiff's Letter Motion (ECF No. 242) is DENIED as moot, since "Ganz is willing to consent to the transfer of Google's motion to compel Ganz in the Western District of Washington to the Southern District of New York for the limited purpose of resolving this motion." (ECF No. 249.) No later than 4/13/2021, Google shall file the necessary papers to transfer the motion to this Court. SO ORDERED.

Dated: 4/6/2021

Re: *SM Kids, LLC v. Google LLC, et al.*, Case No. 18 Civ. 2637 (LGS) (SDA)

Dear Judge Aaron:

This firm is counsel to Plaintiff SM Kids, LLC ("**SM Kids**"). We write pursuant to Your Honor's Individual Rule II.B to request a pre-motion discovery conference respecting a disturbing attempt by Defendants Google LLC, Alphabet Inc., and XXVI Holdings Inc. (collectively, "**Google**") to forum shop, waste this Court's time, and risk inconsistent results respecting documents from a prior action, *Ganz v. SM Kids, LLC*, No. 18-cv-01357-RGA, from the District of Delaware (the "**Prior Ganz Action**"). Google has moved this Court for production of documents in the Prior Ganz Action while simultaneously moving for the same relief against Ganz in Seattle. We believe such conduct should not be countenanced by the Court and the Court should stay the Washington proceeding while the production of documents in the Prior Ganz Action is resolved by this Court.

In short, Google has submitted nearly identical motions in two different jurisdictions. Yesterday, Google submitted ECF No. 236 in this action and also commenced a miscellaneous action, *Google LLC v. Ganz*, No. 2:21-mc-00039-RSL, in the United States District Court for the Western District of Washington (the "**Ganz Miscellaneous Action**"). A true and correct copy of the motion filed in the Western District of Washington is attached hereto as **Exhibit A**.¹ In both this action and Ganz Miscellaneous Action, Google seeks production of additional documents in response to a February 5, 2021, subpoena issued by Google on Ganz (the "**Ganz Subpoena**"). A true and correct copy of the Ganz Subpoena is attached hereto as **Exhibit B**. The genesis of the Ganz Subpoena is itself an end-run around Google's discovery obligations, since Google requested the documents related to the Prior Ganz Action in May 2018, SM Kids objected in August 2020, the parties met and conferred numerous times, and Google accepted the resolution of those meet and confers in November 2020.

¹ Heeding the Court's prior instruction not to burden the record with documents available on PACER, we only submit the motion and respectfully refer the Court to the docket in the Ganz Miscellaneous Action for all supporting submissions.

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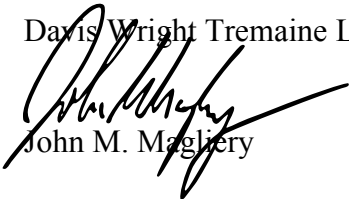
Evidently Google furtively hoped to gain additional documents related to Ganz. Rather than continuing to meet and confer with SM Kids or moving to compel before this Court,² Google agreed to a limitation of party production respecting Ganz, took no action for two months, and then issued the Ganz Subpoena to Ganz, seeking the same documents and communications related to the Prior Ganz Action to which SM Kids had objected. Upon learning of the Subpoena, undersigned counsel contacted counsel for Ganz to confirm that Ganz would comply with the protective order agreed to by the parties in the Prior Ganz Action and the court rules applicable to the court mediation that took place in the Prior Ganz Action. *See* ECF No. 236-1. Ganz produced documents, which were made available to SM Kids on March 1, 2021.

Then, Google took the ultimate step of filing two simultaneous motions for the same relief in two different courts. On March 29, 2021—the last day of fact discovery in this case—Google sought a pre-motion conference seeking an additional production from SM Kids of unredacted versions of documents that Ganz produced with redactions as required by the protective order in the Prior Ganz Action.³ *See* ECF No. 236. Simultaneously, Google filed the Ganz Miscellaneous Action seeking to compel Ganz to provide the documents that Google seeks from SM Kids in ECF No. 236, in which Google alleges, among other things, that SM Kids has “[o]bfuscat[ed] discovery” with “the threat of litigation” by reminding Ganz of its obligations of confidentiality with respect to the documents sought in the Subpoena.

By filing the Ganz Miscellaneous Action, Google opens up two battlefronts over the same issue, requiring SM Kids to file a motion to intervene in the Ganz Miscellaneous Action to resolve identical issues as those before this Court. The documents sought by Google are in both SM Kids’ and Ganz’s possession, and SM Kids learned from a phone call with counsel for Ganz that Ganz objected to the Ganz Subpoena on the grounds that Google should seek the documents from SM Kids. Additionally, the parties have previously agreed to resolve non-party discovery disputes of similar nature as the Ganz dispute before this Court. *See* ECF No. 146, 25:22-26:05. Nevertheless, Google has hedged against receiving an unfavorable result in this Court by seeking the exact same relief elsewhere. The Ganz Miscellaneous Action is blatant forum shopping in order to circumvent this Court’s directives over discovery, and risks the creation of inconsistent court orders. Google should not be permitted to game the court system in its favor in this manner. The dispute should be litigated before this Court, and against SM Kids, not Ganz, a non-party to this dispute.

Respectfully submitted,

Davis Wright Tremaine LLP



John M. Magliery

cc: All counsel of record (via ECF)

² Notably, Google moved to compel on numerous other issues related to its first request of the production of documents but made no mention of any dispute about the Ganz documents. *See, e.g.*, ECF No. 113 (pre-motion letter moving to compel), ECF No. 115 (joint letter on all open discovery issues).

³ SM Kids will respond to the substance Google’s letter motion as directed by the Court’s March 30, 2021, Order.